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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 165.

ROBERT SCHELL, JAMES W. FELLOWS AND EDWARD SCHELL, EXECUTORS OF AUGUSTUS SCHELL, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

OTTO W. POLLITZ AND WILLIAM H. WEITERVELT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 10, 1890.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Otto W. Pollitz and Wm. H. Westervelt, plaintiffs, and Robert Schell et al., executors of Augustus Schell, deceased, defendants, a manifest error hath happened to the great damage of the said Robert Schell et al., executors, &c., of Augustus Schell, deceased, as by their complaint appear. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-seven, in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 24th day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

[SEAL.] TIMOTHY GRIFFITH,
Clerk.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
Circuit Judge.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to forty-four, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Robert Schell, Edward Schell, and James W. Fellows, executors, &c., of Augustus Schell, deceased, plaintiff in error against Otto W. Pollitz and William H. Westervelt, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[SEAL.] TIMOTHY GRIFFITH,
Clerk.

(Indorsement:) O. S. 458. U. S. Supreme Court. Robert Schell, et al., executors, &c., plaintiff in error, against Otto W. Pollitz, dec'd, defendants in error. Writ of error. Due service of a copy of the within writ of error is hereby admitted this 26th day of September, 1887. Almon W. Griswold, attorney for defendants in error.

3 N. Y. Superior Court.

Summons for money demand on contract. (*Com. not ser.*)

OTTO W. POLLITZ AND WM. H. WESTERVELT
against
A. SCHELL.

To the above named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of New York City, at the City Hall in said city, and to serve a copy of your answer to the said complaint, on the subscriber, at his office, No. 60 Wall St., said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of one thousand dollars, with interest from the 1st day of Jan., one thousand eight hundred and sixty, besides the cost of this action.

Dated New York, May 22nd, 1860.

A. W. GRISWOLD,
Plaintiffs' Att'y, 60 Wall Street.

(Endorsed) New York superior court. Pollitz against Schell—summons—New York, May 22, 1860. Due service of a copy of the within was made by me.

4 N. Y. Superior Court.

Notice of Appearance.

AUGUSTUS SCHELL,
ads.
OTTO W. POLLITZ AND WM. H. WESTERVELT.

SIR: You will please take notice, that I am retained by, and appear as attorney for Augustus Schell, the defendant in this action, and demand service of a Bill of Particulars of the plaintiffs' claim herein, and a copy of their complaint upon me, at my office, in the U. S. Court Buildings, Nos. 41 and 43 Chambers St., in the city of New York.

Yours &c.,

JAMES I. ROOSEVELT,
Attorney for Defendant.

To A. W. GRISWOLD, Esq.,
Plaintiffs' Attorney.

(Endorsed) Pollitz et al. vs. Schell—To A. W. Griswold, Esq., Recd. May 30th, 1860.

5 The President of the United States of America, to the justices of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York in the second circuit, shall be certified of a certain cause commenced before you against Augustus Schell, defendant, by Otto W. Pollitz and Wm. H. Westervelt, plaintiff, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 30th day of June, inst., as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Roger B. Taney, esq., Chief-Justice of the Supreme Court of the United States, the 20th day of June, in the year one thousand eight hundred and sixty.

[L. S.] KENNETH G. WHITE,
Clerk.

JAMES I. ROOSEVELT,
Defendant's Attorney.

(Endorsed:) 117. U. S. circuit court. O. W. Pollitz ads.
6 Aug. Schell. Certiorari. James I. Roosevelt, defendant's attorney, to A. W. Griswold, esq. Sir: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, June 20, 1860. Yours, &c., James I. Roosevelt, defendant's attorney. June 21st, 1860.

7 U. S. circuit court.

OTTO W. POLLITZ AND WM. H. WESTERVELT
vs.
A. SCHELL.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 22nd day of May, 1860, last past, an action was commenced in the superior court of N. Y. City, according to the laws of the State of New York, and the rules and practice of said court, in such case made and provided in favor and in the name of the said plaintiffs against the defendant herein upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said court.

That defendant afterwards by J. I. Roosevelt, his attorney, duly appeared in said action, and such proceedings were thereupon had, that afterwards and on the 30th day of June, in the year of our Lord one thousand eight hundred and sixty, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this
8 court, according to the act of Congress in such case made and provided, and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same

in this court according to the course and practice of this court, which allegations and suggestions the defendant does not deny but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs, according to their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant, on the 22nd day of May, one thousand eight hundred and sixty, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of one thousand dollars lawful money of the United States of America for money before that time lent and advanced by the said plaintiffs to the said defendant and at the special instance and request of said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant and at the request of the said defendant, and for other money by the said defendant before that time had and received to and for the use of said plaintiffs; and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the same day and
9 year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebtsd to the said plaintiffs in the further sum of one thousand dollars of lawful money as aforesaid, and being so found in arrear and indebted to the said plaintiffs, the said defendant in the consideration thereof afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, etc.) had not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaint-
10 iffs of one thousand dollars, and thereof the plaintiffs bring suit, etc.

A. W. GRISWOLD,
Plaintiffs' Attorney.

(Endorsed:) U. S. circuit court. Otto W. Pollitz et al. vs. A. Schell. Declaration. Please take notice that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the Book of Common Rules, kept in the office of the clerk of this court, at the city of New York, requiring the within-named defendant to plead to said declaration in twenty days after service of a copy thereof, and notice of said rule or judgment, on his attorney. New York, July 28th, 1860. Served copy on defendant's attorney July 28, 1860.

11 U. S. circuit court, southern district of New York.

AUGUSTUS SCHELL,
ads.
OTTO W. POLLITZ AND WM. H. WESTERVELT. } Plea.

And the said defendant, Augustus Schell, by J. I. Roosevelt, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form, as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiff doth the like, &c.

J. I. ROOSEVELT,
Defendant's attorney.

To A. W. GRISWOLD, esq.,
Plaintiff's attorney.

(Endorsed:) U. S. circuit court. Augustus Schell, ads. Otto W. Pollitz, et al. Plea. Theodore Sedgwick, attorney for defendant. You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York. New York, 18 . Yours, &c., Theodore Sedgwick, defendant's attorney. To , esq., plaintiff's attorney.

12 United States circuit court, southern district of New York.

OTTO W. POLLITZ ET AL.
vs.
AUGUSTUS SCHELL. } O. S. 458 (and other causes.)

On reading and filing the annexed communication, addressed to the United States attorney for the southern district of New York, by the executors under the last will and testament of Augustus Schell, deceased, dated May 8th, 1884, and on reading and filing the annexed consent of the attorneys for the respective parties to the above entitled actions, dated May 8th, 1884, and after reading and filing the certificate, dated April 14th and 24th, 1884, respectively, of the clerk to the surrogate's court, referred to in the above-mentioned consent, now, on motion of Elihu Root, United States attorney, attorney for the defendants, in each of the above-entitled actions.

It is ordered, that Robert Schell, James W. Fellows, and Edward Schell, executors under the last will and testament of Augustus Schell, deceased, be, and they are hereby, substituted as defendants in each of the above-entitled actions in the place and stead of said Augustus Schell, deceased.

WM. J. WALLACE.

Dated New York, May 13th, 1884.

(Endorsed:) U. S. circuit court, southern district of New York.
13 Otto W. Pollitz et al. vs. Augustus Schell, and other causes. Certified copy. Order substituting executors as defendants. A. W. Griswold, plaintiff's attorney.

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the 13th day of January, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Hoyt H. Wheeler, sitting as circuit judge.

OTTO W. POLLITZ AND WILLIAM H. WESTERVELT
vs.
ROBERT SCHELL, EDWARD SCHELL, AND JAMES W. Fellows, ex'rs of Augustus Schell, deceased. } O. S. 458.

Now come the plaintiffs, by A. W. Griswold, their counsel, and move the trial of this cause. Likewise come the defendants, by Thomas Greenwood, esq., ass't U. S. attorney, their attorney. Thereupon a jury is empanneled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on Friday, January 15th, 1886, the jury retired, and on their return render a verdict whereby they find for the plaintiffs in the amount of four thousand and seventeen dollars and sixty-one cents.

15 It is ordered that a certificate of probable cause be entered herein, and that the defendants have a stay of all proceedings on said verdict for fifty days.

A copy.

_____, *Clerk.*

H. H. M.
O. S., 458.

(Endorsed:) U. S. circuit court, southern district of New York. Otto W. Pollitz et al. vs. Robert Schell et al., ex'rs, &c. Certified copy. Verdict, Jan'y 15, 1886. A. W. Griswold, plaintiffs' attorney.

16 U. S. circuit court, southern district of New York.

OTTO W. POLLITZ ET AL.,
vs.
ROBERT SCHELL ET AL., EX'RS, &C. } O. S. 458.

In conformity with the decision of Judge Wheeler filed in this case on March 19th, 1887, the plaintiffs herein consent to and do hereby remit three thousand eight hundred and ninety and $\frac{99}{100}$ dollars of the verdict rendered herein in their favor, on January 15th, 1886, being the amount, with interest, of the excess of duty and penalty and also the gauger's fees exacted on the entry per brig "Gideon," from Malaga, September 1st, 1857, thereby reducing said verdict to the sum of one hundred and twenty-six and $\frac{62}{100}$ dollars.

Dated March 21st, 1887.

ALMON W. GRISWOLD,
Plaintiffs' Attorney.

(Endorsed): O. S. 458, U. S. circuit court, southern district of New York—Otto W. Pollitz et al., vs. Robert Schell et al., ex'rs, &c.—Copy. Plffs. remittitur of part of verdict, and notice—A. W. Griswold, plffs. att'y. Due service of a copy of within remittitur, and notice filing
17 original thereof is hereby admitted. Dated March 23d, 1887—(Sgd) Stephen A. Wallsen, U. S. att'y, att'y for dfts.—Sir: Please take notice that plaintiffs' remittitur, of which the within is a copy, has this day been filed in the office of the clerk of this court. Dated March 23d, 1887. Yours, &c., A. W. Griswold, pl'ffs att'y. To Stephen A. Walker, U. S. att'y for dfts.

18 And the said defendants by the U. S. attorney, their attorney, come and defend the wrong and injury, &c., and say that they did not undertake and promise in manner and form as the said plaintiffs have above thereof declared against him, and of this they put put themselves upon the country, &c. Therefore the issue above joined is ordered by the said court to be tried at a circuit court appointed to be held at the City Hall of the city of New York, on the third Monday of October, in the year one thousand eight hundred and eighty-five. And now at this day, to wit, the 15th day of January, 1886, being as yet of the said October term, 1885, before the said justices at the City Hall of the said city of New York, came the said parties by their attorneys aforesaid; and the said district judge, sitting as circuit judge, before whom the said issue was tried, has sent hither his record, had before him in these words, to wit:

Afterwards, that is to say, on the day and at the place within contained, before Hoyt H. Wheeler, esq., sitting as judge of the said circuit court, came as well the within named Otto W. Pollitz et al., plaintiffs, as the said Robert Schell et als., executors, defendants, by their respective attorneys within mentioned; and the jurors of the jury whereof mention is within made, being summoned, also came, who, to speak the truth in the matters within contained being chosen, tried, and sworn upon their oaths,
19 do say that the said defendant did undertake and promise in manner and form as the said plaintiffs have above thereof complained against him, and they assess the damages of the said plaintiffs be reason of the premises at the sum of one hundred and twenty-six and $\frac{62}{100}$ dollars and interest to Sept. 8th, 1887, being $12.51 over and above their costs and charges by him about his suit in this behalf expended, and for those costs and charges, the sum of fifty six and $\frac{9}{100}$ dollars. Therefore it is considered that the said plaintiffs recover against said defendants their damages aforesaid, by the jurors aforesaid, in form aforesaid found, and also their costs and charges of increase by the court, now here adjudged to the said plaintiffs with their assent, which said damages, costs, and charges in the whole amount to one hundred and ninety-five $\frac{33}{100}$ dollars.

Judgment signed this eighth day of September, A. D. 1887.

TIMOTHY GRIFFITH,
Clerk.

(Endorsed:) O. S. 458.—U. S. circuit court. Otto W. Pollitz, et al., vs. Robert Schell et al., ex'rs, &c. Judgment roll. A. W. Griswold, plaintiffs' att'y. U. S. circuit court. Filed Sep. 8, 1887. Timothy Griffith, clerk. 12 m. $26.85 chg.

20 United States circuit court, southern district of New York.

OTTO W. POLLITZ, ET AL.,
vs.
ROBERT SCHELL ET AL., EXECUTORS OF AUGUST Schell, deceased. } O. S. 458.

Bill of exceptions.

Afterwards, to wit, on the 13th, 14th, and 15th days of January, 1886, at a stated term of this court begun and holden on the third Monday of October, 1886, before the honorable Hoyt H. Wheeler, district judge of the United States for the district of Vermont, duly assigned to hold this court, the aforesaid issue so joined as between the said parties as aforesaid as by the record more fully appears, came on to be tried by a jury duly impanelled and sworn for that purpose, the said plaintiffs being represented by Almon W. Griswold, esq., and defendants by William Dorsheimer, esq., United States attorney, and Thomas Greenwood, esq., Assistant United States attorney. And in the course of the trial the said counsel for the defendants did take and allege sundry exceptions to the rulings, instructions, charge, and direction of the court and to the refusal of the court to give such instructions and directions to the jury as
21 then and there prayed for by them, which exceptions are hereinafter severally set forth.

To maintain their said issues the plaintiffs introduced evidence tending to show that on October 14, 1859, they imported per the William Frederick, into the port of New York, from Trieste, Austria, certain hemp and entered the same for warehouse according to law in such case made and provided; that the plaintiffs' invoice and the collector's copy of the warehouse entry, made by them, of this hemp were lost and could not be found at the custom-house, though a subpœna for its production had been served on the collector. Mr. Van Arsdale, for 21 years a clerk in the custom-house and the searcher of records, reported that the entry could not be found; the plaintiffs' evidence further showed that the naval office copy of such entry set out the value of the hemp in Austrian paper florins; that said collector valued each of such florins at forty-eight and a half cents and levied duty at the rate of twenty-four per centum ad valorem, pursuant to Schedule C of the aforesaid act of 1846, as amended by that of 1857, upon the entered florin value of the hemp converted into lawful money of the United States upon the basis of forty-eight and a half cents per florin; that the plaintiffs withdrew said hemp from warehouse and paid the duties as follows, viz: Part on Oct. 20th, part on Oct. 24th, and the remainder on Nov. 25, 1859, and duly protested at the time of each withdrawal against the exaction of duty, on the basis of the aforesaid valuation of the paper florin as follows:

22 *Protest.*

NEW YORK, *Oct. 20th*, 1859.

To the Hon. AUGUSTUS SCHELL,
Collector, Port of New York:

DEAR SIR: We hereby protest against paying the duty assessed on 25 bales hemp, portion of 100 bales imported by us per brig "William Fred-

erick," from Trieste, claiming that the same is entitled to entry at the value of silver and not paper florin, the former representing the actual cost of the goods, and is in accordance with the Amer. consul's certificate attached to our invoice now on file at the custom-house.

We only pay amount exacted in order to obtain possession of our goods, and claim to be refunded the excess.

Yours very res't'y,

OTTO WM. POLLITZ & CO.

Plaintiffs then produced as a witness in their behalf William H. Westervelt, who, being duly sworn, testified that he was one of the plaintiffs in this action; that his firm was O. W. Pollitz & Company; that Mr. Pollitz was not now in this country, but was living in Hamburg.

23 The witness was then shown the plaintiffs' three protests as to the Austrian florin in the case of their importation of hemp, October 14, 1859, per the William Frederick, and testified that he could not say positively that there was attached to the plaintiffs' invoice of these importations a consular certificate as those protests allege, but that he presumed that such certificate was so attached from the fact of his drawing these protests in the way he did. That he drew these protests, that he had no doubt whatever that such certificate was attached to the invoice from the fact that he signed the protests worded in that way. That he would not have been very likely to sign protests alleging that plaintiffs' invoice had such a certificate attached to it if it had not.

Witness on cross-examination testified that he meant by consular's certificate, a certificate by the consul at the port of exportation of the value of the Austrian florin, on the date of the exportation of the hemp in suit; that he was then unable to remember how long after the invoice of that hemp was produced at the custom-house he made out these protests; that he had no general idea of it; that he had too much to carry in his mind to remember such details of twenty-five years ago; that the warehouse entry of this hemp was signed by him. The invoice must have been accompanied by the entry at the same time, otherwise it couldn't have been passed. The protests are dated the 20th and 24th of October and 25th of November, the time the goods were withdrawn; in one case, six

24 days after the invoice was presented at the custom-house, in another case ten days, and in another case a little more than a month; that he had no memorandum at the time he made plaintiffs' protests by which he was enabled to remember whether the consular's certificate was attached to the invoice.

X-Q. Your protests were made some little time after you had filed your invoice, in one case six days and in another case ten days, and in another case a little more than a month. I ask if you had any memoranda which enabled you to say or to recall that there was such a certificate attached to this invoice at the time you made the protests?

A. No, sir.

That from the way these protests were drawn he presumed the consular's certificate as to currency was stamped on or attached to the invoice. He had no recollection as to consular's certificate; that he only took it for granted, from his making the protests in the way he did, that such a certificate was attached to the invoice, as all goods bought in Aus-

tria at that time were bought with paper money, and that there was no other money then in circulation in Austria except the paper money, and that fluctuated just the same as such money did in this country during the war.

That he did not recollect positively that there was any such certificate in case of the invoice of this hemp; that it was impossible for him to do so; that at the time these protests were made he, of course, believed so, and knew it, or otherwise he never would have made these protests;
25 that he arrived at that conclusion because the invoices coming from Trieste at that time and always were so made, and such a certificate was just as much part of the invoice itself; that he had no recollection independent of what he believed to have been the practice as to whether any such certificate was attached to that particular invoice or not, except what the protest showed.

Plaintiffs then recalled as a witness in their behalf John V. Van Arsdale, who testified that he had the manifest of the William Frederick from Trieste, October, 1859. That the manifest showed that there were eleven consignees of goods imported by that vessel, and that one of these consignees were O. W. Pollitz & Company. That this manifest showed that there were then imported by this vessel five cases of sponges and one hundred bales of hemp, consigned to order.

Witness was then shown seven invoices of merchandise other than the plaintiffs' importations of hemp from Trieste made by that vessel at that time, and he testified that those invoices were all the invoices of such importations that he found on file at the custom-house.

Plaintiffs' counsel then offered these seven invoices, together with the consular's certificates attached thereto, in evidence for the purpose of showing the value of the Austrian florin at the port of Trieste at the date when this importation of the plaintiffs' hemp was exported.

To the admission in evidence of these invoices and consular certificates the defendants' counsel objected.
26 First, on the general ground that they were irrelevant, incompetent, and immaterial.

Second, upon the authority of the case of Dutilh against Maxwell (2 Blatchford, p. 541), that they were not the best evidence as required by section 226 of the general regulations under the revenue and collection laws of the United States issued by the Treasury Department, February 1, 1857, which provides "That the consular's certificate of the value of the foreign currency in which the invoice is made out, when depreciated or its value not fixed by laws of the United States, will be according to form No. 224 of these regulations, and must be attached to the invoice in a manner that will best secure it from loss or removal; when in such case the certificate is not produced, the importer is required to give a bond to produce such consular certificate, whether the importer be subject to duty or not." * * * And the consular's certificate, form 224, reads: "I, A. B., consul of the United States of America, do hereby certify that the true value of the currency of the kingdom of ———, in which currency the annexed invoice of the merchandise is made out, is —— cents, estimated in United States or Spanish silver dollars. (Sgd. A. B. "

The court then overruled the defendants' objections, and to this ruling

the defendants, by their counsel, excepted, which exception was duly noted and allowed; and the court thereupon admitted in evidence these
27 certificates for the purpose of showing the consular value of the Austrian paper florins at the time of the making of these seven invoices.

Each of these consulars' certificates is in the following words:

U. S. circuit court, S. D. N. Y.

Pl'ff's Exhibit 31.

CONSULATE OF THE UNITED STATES OF AMERICA, TRIESTE.

I, the undersigned, consul of the United States of America for the port of Trieste and the dependencies thereof, do hereby certify that on the 9th day of July, 1859, the agio of exchange, according to a certificate of a sworn broker of the Exchange of this city, was one hundred and thirty (fl. 130) new paper florins against one hundred florins (fl. 100) in new silver florins, the same being the actual currency of Austria.

I also certify that the Imperial Government will not permit this difference of agio to be quoted officially, but the said Imperial Government refusing by imperial decree of the 29th of April, 1859, to accept of the paper florin at the imperial custom-houses, and further authorizing by another imperial decree of the same date, the National Bank of Austria to refuse the payment of the paper florin with silver, this certificate has become a necessity for the advancement of trade between this port and the United States of America, notwithstanding this consulate has no public notice of the difference between the silver and paper florin of Austria.

Given under my hand and seal of office, at Trieste, this 11th day
28 of July, 1859.

[L. S.] STEPHEN S. REMAK.

CONSULATE OF THE UNITED STATES OF AMERICA, TRIESTE.

I, the undersigned, consul of the United States of America for the port of Trieste and the dependencies thereof, do hereby certify that the within invoice is properly made out in the new Austrian currency, in accordance with the requirements of the Imperial decree dated April 27, 1858; the new Austrian silver florin bearing to the old silver florin (the value of which is fixed by the laws of the United States) the relative value of 105 to 100; and I therefore certify that the amount stated in the said invoice of 136.02 new Austrian silver florins is equal to 129.32 of the said old silver florins.

Given under my hand and seal of office, at Trieste, this 11th day of July, 1859.

[L. S.] STEPHEN S. REMAK.

The plaintiffs then produced as a witness in their behalf, I. Augustus Stanwood, who, being duly sworn, testified: He was now refund clerk, and for about ten years past had been a clerk in the auditor's department

of the custom-house in this city; that he was quite familiar with custom-house papers; that the value of the hemp imported by the William Frederick was $3,994, and that the duty paid thereon at the rate of twenty-four per cent. ad valorem was $958.56. That taking the value of
29 the silver Austrian florin at 105, and the value of the paper Austrian florin at 100, the excess of the value of the paper florin taken by the collector in the case of this importation was $190, and that duty exacted on such $190, at twenty-four per cent., was $45.60 with $81.02 interest, making $126.62.

Plaintiffs then rested.

Counsel for the defendants then read in evidence in their behalf the following articles from General Regulations under the Revenue and Collection Laws of the United States, issued by the Treasury Department, February 1, 1857, articles 214–15–16, 220, 226, 714–15, 319, 320, 321–2–3–4–5–6–7–29–30–31–32–34 and 35.

ART. 214. The law requires invoices of merchandise imported into the United States and subject to an ad valorem duty to be made out in the currency of the country or place from which the importation is made.

In the estimation of the value of imports in order to the assessment of duties, the currency of the invoice must be converted into money of the United States according to the rates of value determined in the following modes, to wit:

ART. 215. First. Where the value of the foreign currency is fixed at specified rates by a law of the United States that value is to be taken in all cases in estimating the duties, unless collectors shall have been otherwise previously instructed by this Department, or a depreciation of the
30 value of the foreign currency is duly shown by consular certificate attached to the invoice.

ART. 216. Second. Where the value of the foreign currency is not fixed by any law of the United States the invoice must be accompanied by a consular certificate showing its value to Spanish or United States silver dollars.

ART. 220. The value of the Austrian silver florin is fixed by the laws of the United States at 43½ cents, and the Austrian paper florin is usually depreciated in comparison with it. Assuming it to be, for example, depreciated 38 per cent., the computation will be made by collectors by proportion, to wit, as 138 : 100; so is the amount of the paper florin stated in the invoice to the value in silver florins. Of course the consular certificate, showing the rate of depreciation, must be produced in such cases.

ART. 226. The consular certificates of the value of the foreign currency in which the invoice is made out, when depreciated, or its value not fixed by the laws of the United States, will be according to form No. 224 of these regulations, and must be attached to the invoice in a manner that will best secure it from loss or removal.

When, in such case, the certificate is not produced, the importer is required to give a bond to produce such consular certificate, whether the import be subject to duty or not. This bond will be in the following form, and, if the merchandise be dutiable, in a penal sum equal to the
31 amount of duties accessible thereon; but, if free of *of* duty, in the penal sum of one hundred dollars.

[Form No. 75.]

Bond to produce consular currency certificate.

Know all men by these presents, That we ——— ———, are held and firmly bound unto the United States of America in the sum of ——— dollars, to be paid to the said United States; for payment whereof, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals, dated this —— day of ———, in the —— year of the Independence of the said United States, and in the year of our Lord one thousand eight hundred and ———. Whereas the above bounden ——— entered certain goods, wares, and merchandise, imported by ———, in the ship ———, whereof ——— is master, from ———, the amount of duties charged thereon is the sum of ———. And whereas the invoice of the said goods, wares, and merchandise, presented on the entry, thereof, was made out in a foreign currency, the value whereof is not fixed by the laws of the United States, and which invoice was not accompanied by a certificate from the consul of the United States at ——— aforesaid, being the place of exportation of the said goods, wares, and merchandise, showing the value of the currency wherein the invoice was made out, in United States or Spanish silver dollars. Now, therefore, the condition of this obligation is such, that if the
32 above bounden ——— shall well and truly pay, or cause to be paid, unto the collector of the customs for the district of ———, for the time being, the sum of ———, or shall produce such certificate as aforesaid within ——— months from the date of these presents, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of—

——— ———.

——— ———. [SEAL.]
——— ———. [SEAL.]

ART. 714. Invoices of ad valorem or free goods, when made out in a foreign depreciated currency, or a currency the value of which is not fixed by the laws of the United States, whether the importer or owner resides in this country or abroad, must in each case be accompanied by a consular certificate, showing the value of such currency in United States or Spanish silver dollars, according to the annexed form:

[Form No. 224.]

Of consular certificate of the value of currency.

I, A. B., consul of the United States of America, do hereby certify that the true value of the currency of the Kingdom of ———, in which currency the annexed invoice of merchandise is made out, is ——— cents, estimated in United States or Spanish silver dollars.

(Signed:) A. B.

33 ART. 715. The consular officers will either make their certificate upon the invoice itself, or give such details, where it is attached as a separate document, as to the names of the shipper, consignee, vessels

and captains, the nature of the merchandise, and the total amount, as will fully identify the invoice annexed, instead of giving, as heretofore, their certificates in such general terms as to admit of the deception, which the Department is informed has been practised, of substituting another invoice in place of the one for which the certificate was originally issued.

Both sides having rested, the defendants' counsel moved the court to direct a verdict in their favor, on the ground that the plaintiffs had not proven facts sufficient to constitute a cause of action.

This motion the court denied, and to this ruling the defendants, by their counsel, excepted, which exception was duly noted and allowed.

Both sides having summed up the case, the defendants requested the court to charge as follows:

Defendants' requests.

I. That the presumption of law is that the duty exacted in the case of plaintiffs' merchandise was legally exacted by the defendant as collector of customs.

34 II. That the presumption of law is that the requirements of law in cases of plaintiffs' merchandise were complied with by the defendant as such collector.

III. That until such presumptions are overcome by the plaintiffs, the verdict of the jury should be for the defendant.

IV. That if the jury find that the delay in bringing this action to trial was due to the negligence of the plaintiffs then they will not allow to the plaintiffs any interest upon the amount they may find due the plaintiffs as principal.

The court thereupon charged the jury as follows:

WHEELER, J.:

GENTLEMEN: The only question in this case is, whether on the invoice, which we have not got, there was a statement by the consul that the florin, in which currency these goods were bought, had depreciated in value, so that it stood to the valuation mentioned in the law of the United States, as 105 to 100. Now if that statement was on the invoice, the plaintiffs are entitled to recover; if it was not on, then the defendant is entitled to recover. Now you will attend to the evidence as to its being on. That evidence comes from Mr. Westervelt. The invoice is lost. You heard him testify about its being on; that the consular certificate he said was stamped on the invoice. Well now if that was true, then it was on. If that

35 was not true, if you don't believe Mr. Westervelt, either because he has forgotten or because he doesn't tell the truth, or for any reason, then you find it was not on. But if on, that don't prove the case. They must prove that proportion, because he don't tell what the proportion was. He don't pretend to know, and it is required that this proportion shall be stated—105 to 100. Now, all we have got as to that is his statement and the other invoices which came by the same cargo, certified by the same consul; and if you think that the consul also put into these other invoices 105 to 100 as the value of the florin, and also think that Mr. Westervelt is right about its being on, then return a verdict for the plaintiffs as to that. If not, return a verdict for the defendant; that is all there is to it. You see the law required them to take it out, if the

consul certified it on and it was presented with the invoice; and if he didn't certify it, why then it didn't require them to take it out. We have nothing to do with whether the consul was right. But whether the consul did certify on that invoice that it was 105 to 100—depreciated so that it took 105 to make 100 in value in the coin as established by the law of the United States—if that was on, the collector ought to have corrected that, and taken this out. If it was not on, he ought not to have taken it out. That is all there is to the case. The plaintiffs must prove that; that is, they must satisfy you that that is so.

36 The amount of your verdict will be $126.62.

That is the sum paid, with interest, as figured up by the expert here.

And, as I understand the law, when money is exacted in that way, that is, the collector has the goods in his hands, they go right into his possession; the importer can't have them until the collector will let him have them; the importer can't get the goods until he pays all the collector asks. When the collector takes the goods and holds them, until money is paid he becomes liable for the interest all the time he keeps the money. He has kept this money until now; so that if the plaintiffs are entitled to it at all, they are entitled to interest until now.

Now as I said before, the plaintiffs are to make out their case; that is, you are to assume that the defendant is right except so far as the plaintiffs have shown that he was wrong. That is the rule to govern as to the measure of proof. Not that the plaintiffs must show beyond reasonable doubt, but they must show by a fair preponderance of proof, so that in looking back upon this question you can say that the preponderance of testimony is in favor of the plaintiffs. And if it is just even, then the defendant is entitled to the verdict. That is all I feel called upon to say to you.

At the close of the charge, defendants' counsel excepted to so much of the charge of the court as instructs the jury, that if they find for the

37 plaintiffs as to the Austrian florin they shall find the sum of $126.62 principal and interest, and to so much of the charge as relates to the instructions of the court as to interest. "As I understand the law when money is exacted in this way, that is, the collector has the goods in his hands, they go right into his possession; the importer can not have them until the collector will let him have them; the importer can not have the goods until he pays all the collector asks. When the collector takes the goods and holds them until the money is paid he becomes liable for the interest all the time he keeps the money. He has kept this money until now; so that, if the plaintiffs are entitled to it at all, they are entitled to interest until now."

Defendants' counsel also excepted to the refusal of the court to charge as requested in the defendants' fourth request to charge. Each of these exceptions to the portions of the charge of the judge above mentioned, and to his refusal to charge as requested by the defendants, were duly noted and allowed.

Thereupon the jury returned a verdict for the plaintiffs in the sum of $126.62, and inasmuch as the exceptions, matters, and things aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions; and

It is ordered, that the same be filed as a part of the record herein
38 with like force and effect as if the same had been reduced to writing, signed, and filed before the cause was given to the jury.

Witness my hand at the city of New York, this 27th day of June, 1886.

HOYT H. WHEELER.

(Endorsed:) U. S. circuit court, southern district of New York. Otto W. Pollitz et al. versus Robert Schell et al.; bill of exceptions. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court, filed June 30, 1887, Timothy Griffith, clerk.

39 Supreme Court of the United States.

ROBERT SCHELL & AL., EXECUTORS, &C., PL'FFS in error,
vs.
OTTO W. POLLITZ & ANO., DEF'TS IN ERROR. } Assignment of errors.

Afterwards, to wit, on the second Monday of October, in the same term before the justices of the said court at the Capitol in Washington, come, the said plaintiffs in error by Stephen A. Walker, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendants.

And the said plaintiffs pray that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that (they) the said plaintiffs may be restored to all things which (they) have lost by occasion of said judgment, &c.

STEPHEN A. WALKER,
Attorney for Pl'ffs in Error.

40 (Endorsed:) U. S. Supreme Court. Robert Schell & al., executors, &c., pl'ffs in error, versus Otto W. Pollitz & ano., def'ts in error. Assignment in error. Stephen A. Walker, United States attorney, attorney for pl'ffs in error. Due service of a copy of the within is hereby admitted. New York, Sept. 26, 1887. Alma W. Griswold, attorney for plaintiff. To A. W. G., esq., attorney for def'ts in error. U. S. circuit court. Filed Sep. 26, 1887. Timothy Griffith, clerk.

41 Supreme Court of the United States.

ROBERT SCHELL, EDWARD SCHELL, AND JAMES W. FELLOWS, executors, &c., of Augustus Schell, deceased, plaintiffs in error,
vs.
OTTO W. POLLITZ AND WILLIAM H. WESTERVELT, defendants in error. } Joinder in error.

And afterwards, to wit, on the second Monday of October, in said term, 1887, the said defendants in error, by Almen W. Griswold, their attorney,

come here into court and say that there is no error, either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And they pray that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid, above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

ALMEN W. GRISWOLD,
Attorney for Defendants in Error,
11 *Pine St., New York.*

42 (Endorsed:) United States Supreme Court. Robert Schell et al., ex'rs, &c., plff's in error, vs. Otto W. Pollitz et al., def'ts in error. Joinder in error. A. W. Griswold, att'y for def'ts in error, 11 Pine st., New York. Due service of a copy of within joinder in error is hereby admitted. Dated Sept. 27, 1887. Stephen A. Walker, attorney for plff's in error. U. S. circuit court. Filed Sept. 27, 1887. Timothy Griffith, clerk.

43 UNITED STATES OF AMERICA, *ss:*

To OTTO W. FOLLITZ and WM. H. WESTERVELT, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-seven, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Robert Schell et al, executors, &c., of Augustus Schell, deceased, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speed ustice should not be done to the parties in that behalf.

Dat l September 24th, 1887.

E. HENRY LACOMBE,
Circuit Judge.

44 (Indorsed:) O. S. 458. U. S. Supreme Court. Robert Schell et al., executors, &c., plaintiffs in error, against Otto W. Pollitz & ano., defendants in error. Citation. Due service of a copy of the within citation is hereby admitted this 26 day of September, 1887. Almen W. Griswold, attorney for defendants in error.

45 (Indorsed on cover:) No. 165. Robert Schell, James W. Fellows, and Edward Schell, executors of Augustus Schell, deceased, late collector of the port of New York, plaintiffs in error, vs. Otto W. Pollitz and William H. Westervelt. S. New York, C. C. U. S. Filed October 10, 1887.